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CITATIONS

COURT DECISIONS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-88

S&E CONTRACTORS, INC., *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

SUMMARY

The Government's argument is that it has a right to a judicial review of an agency disputes decision under the Wunderlich Act since that Act itself makes no reference to either party. There is an appealing attraction to the idea that plain words suggest a plain meaning, but the history of the Wunderlich Act convincingly rejects the Government's interpretation. That history shows an unsuccessful effort to obtain for the Government a right—to be assertable by the GAO—to question the merits of an agency's final decision on contract matters. The bills that contemplated such a role for the GAO were rejected and, further, at no point during the hearings was it ever

advocated that, apart from the GAO, the contracting agencies themselves, or some other governmental arm, should be vested with authority to seek judicial review in behalf of the Government.

The only reason this case is in court today is because of the GAO. The very authority that had been denied that office under the Wunderlich Act was improperly used by it in this case to usurp the responsibility, authority and powers of the Atomic Energy Commission and interfere with that agency's contractual relationship with Petitioner, at a point in time when both parties (the AEC and Petitioner) had concluded their agreed-upon disputes procedure in Petitioner's favor. This was accomplished by an advance notice of disallowance, preventing the AEC from implementing its final disputes decision.

We say it is a specious and illogical argument to defend the non-payment of Petitioner's claims under the broad, general theory of a "right to judicial review." But for the GAO there would never have been any litigation. The whole line of reasoning for the allegation that the Government has a "right to judicial review" fails because of the failure of the major premise. The case therefore has no standing in court on a "Wunderlich Act" review.

For the same reason we submit that the question of the powers and duties of the Department of Justice to conduct litigation in behalf of the United States, as advanced by the Government, are not material.

The Government also argues here that by acquiescing in the GAO advance notice of disallowance and directive not to pay Petitioner's claims, the AEC has repudiated its final decision and that this is the precipi-

tating cause of the controversy. This is incorrect in fact. It is negated not only by the AEC's own language that it would "... take no action ... inconsistent with the views expressed by the Comptroller General ...." (App. 10), but by the position of the Comptroller General as well. (Govt. Br. 44)

Finally, viewing this case from the standpoint of the orderly functioning of the Government, in terms of its relationship with contractors, and in terms of the audit functions that are carried out by the GAO, there is neither need nor justification for judicial review of agency disputes decisions. The Government is adequately protected by the management and legal staffs of the contracting agencies who are fully qualified to act upon the issues of fact and law which may develop in a controversy between a contractor and the Government. This is true both at the contracting officer level as well as in the contract appeal board levels. Intervention by the GAO should be restricted to cases of fraud or overreaching.

I. THE WUNDERLICH ACT, BY ITS TERMS, CONFERS NO RIGHT UPON THE GOVERNMENT TO OBTAIN JUDICIAL REVIEW OF AN AGENCY DISPUTES DECISION. THE HISTORY OF THE ACT REFLECTS AN EXCLUSION OF THE GAO FROM THE PROVISIONS OF THE LAW BECAUSE OF OPPOSITION TO THE PRINCIPLE OF COEXTENSIVE REVIEW.

The Government's brief takes the position that even though Congress did not adopt a proposed Wunderlich bill which would have specifically granted the GAO authority to intervene in the agency disputes process, nevertheless, the Wunderlich Act—as enacted—was intended to, and did give to the Government, a right to a judicial review of agency disputes decisions coex-

tensive with that permitted a contractor under the terms of that law.

The language of the statute is the starting point for this argument. According to the Government, since there is nothing in the wording of the Act to suggest that its provisions should be applicable only to decisions adverse to a contractor, it follows therefore that no one may assert the finality provision of a Government contract to bar judicial review. The argument begs the question. The root issue is whether the Government has a right, *in the first instance,* to refuse payment on an agency decision favorable to a contractor in order to force judicial review. On this issue—which is the determinative issue in this case—the statute provides no answer whatsoever.

Historically, the right of access to the courts to seek judicial review of an adverse disputes decision was a right that belonged to the contractor alone. The restoration of that right was the purpose of the Wunderlich Act. The argument is now made that the Act also subsumed a congressional intent to provide for judicial review when initiated by the Government. We strongly disagree.

One of the most pervasive themes in the legislative history of the Wunderlich Act was the opposition expressed, by Government and industry alike, to the proposed bill that would have recognized a right in the General Accounting Office to intervene in the administrative disputes process. Because of that opposition—which was directed mainly to the impairment of finality that would result—the GAO was taken out of the bill (Pet. Br. 28-33, 42). This notwithstanding, the Government now urges this Court to disregard the role played by the GAO in this case because the legislative

controversy over the GAO "did not overshadow the substantial support for a judicial review that would work both ways." (Govt. Br. 9) This argument reduces the controversy over the GAO to a nullity.

To begin with, the statements and comments that comprise the Government's argument on the legislative history deal, in the main, with those legislative proposals in the 82d Congress and in the early 83d Congress that expressly provided a role for the GAO in the disputes process. The Government, in other words, supports its case, not in terms of the law that was enacted, but in terms of the law that might have been. Even assuming the validity of such an approach to statutory interpretation, the more important point is that there is a convincing lack of proof that Congress was ever asked to consider, or did in fact consider, a Government right to obtain court review of an agency decision through any means *other than* by the intervention of the General Accounting Office in the disputes process.

Repeatedly during the hearings, when support was voiced for the idea of protecting the Government's interest against erroneous contract decisions, the GAO was seen as the way to secure that end, not the contracting agencies or the Justice Department as the Government now claims. This thought was expressed not only by representatives of private industry—for example, George Leonard speaking for the Wunderlich Contracting Company had stated during the first day of the House hearings that, under then existing law, the right to appeal a contracting officer's decision was open neither to the contractor through the courts nor to "the Government through the GAO . . . ." *Hearings Before Subcommittee No. 1 of the House Committee*

on the Judiciary, 83d Cong., 1st & 2d Sess. 7 (1953, 1954)—but was stated with equal clarity by Government representatives. See, for example, the statement of E. L. Fisher, Counsel for the General Accounting Office (*id.* at 42), the testimony of U. Bonnell Phillips, Assistant to the Assistant Attorney General, Civil Division, Department of Justice (*id.* at 52) and the testimony of J. H. Macomber, Jr., Associate General Counsel, General Services Administration (*id.* at 59).

Indeed, the very witnesses whose statements the Government now relies upon to support its argument, were referring not to agency-initiated review or review in the abstract, but court review to be realized through the mechanics of GAO intervention. For example, Frank L. Yates, the Assistant Comptroller General, in stating his dissatisfaction with S. 2487 said: "no provision is made therein for a review of decisions of administrative officers by the Government, through the General Accounting Office." *Hearings Before a Subcommittee of the Senate Committee on the Judiciary*, 82d Cong., 2d Sess. 10 (1952). Mr. Yates did not express the need for protection of the Government's interests in any terms *other than* the GAO. Nor did John C. Hayes, Counsel for the Associated General Contractors of America. When this association initially went on record in support of coextensive review (a position which they later changed [1]), Mr. Hayes said:

> This legislation as finally adopted should interpose no bar to further administrative review by an

[1] Throughout its brief the Government relies upon testimony that was directed to legislative proposals that either contemplated or did specifically include the GAO. The fallacy of proving this case by relying upon such testimony is well illustrated in the position taken by the Associated General Contractors of America. Orig-

> agency of government wholly independent of the department, agency, or bureau involved in the dispute. Hence, there should be little or no additional burden placed on the courts. (*Id.* at 30)

That Mr. Hayes did not have in mind a right of judicial review to be implemented by the contracting agencies themselves could hardly have been made clearer. The same is true of the other witnesses upon which the Government relies.[2]

Given this constant identification between a Government right of review and the GAO as the means of obtaining that end, there is no basis upon which to find that Congress could have intended to preserve for the Government a right of review over agency decisions when the bill that it enacted specifically deleted all reference to the GAO. And especially is this so when

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inally, as the Government's brief points out, the Association did support Government review (Govt. Br. 15, 20) but what is overlooked is that, at a later point in the House hearings, when opposition to the GAO had crystallized, the Association joined the Department of Defense in opposing S. 24. The Air Force opposed the bill because it saw the finality of its decisions being impaired (Pet. Br. 42) and the Association, in joining that opposition, went on record for the proposition that it was "primarily interested in the early enactment of legislation which will assure members of our industry the right of judicial review." 99 Cong. Rec. 4598.

[2] Gardiner Johnson (Govt. Br. 15) stated: "I understood that they [the GAO] simply wanted practically the same right that the contractors are requesting, to take an appeal from what they consider to be an unfair and unreasonable decision." (*Senate Hearings* at 84) Elwyn L. Simmons, president of a contracting company (Govt. Br. 18) urged legislation to protect the contractor and said that, at the same time, he had no objection to the inclusion of the GAO in the bill. (*House Hearings* at 5) Alan Johnstone, a private attorney, (Govt. Br. 18) identified the GAO as that office "which objectively watches over the enormous expenditures of the Government, especially in its defenses . . . ." and, on that ground, defended its inclusion in the then-pending bill (*House Hearings* at 20).

one considers the fact that the opposition which had been voiced against the GAO was directed, not against that office *per se,* but against the threat to the principle of finality that it represented.

The fact is that Congress did not see its amended bill as granting any right of judicial review to the Government. Late in the House hearings, when the amended bill came under consideration, the point was raised during the testimony of Franklin Schultz that coextensive review remained a danger even under the amended bill. Congressman Edwin E. Willis, a member of the House Committee, questioned this:

> MR. WILLIS. I do not know that I follow your last point. What danger do you anticipate?
>
> MR. SCHULTZ. The danger I anticipate is that the GAO may rely on the wording of this bill and the legislative history to permit it to reverse for lack of substantial evidence, a contracting officer who has made a decision favorable to the contractor . . . .
>
> MR. WILLIS. This judicial review referred to in that passage there referring to a review by GAO, when GAO has been left out deliberately as compared to S. 24?
>
> MR. SCHULTZ. Well, that is persuasive, sir . . . . (*House Hearings* at 110, 111)

The Government is quite correct when it says that Mr. Schultz' testimony "did not refer to the fact that the agency itself or the Department of Justice might be involved in the government's decision to force judicial review." (Govt. Br. 22). It only begs the obvious to state the reason for this "omission": The idea of an agency appealing from its own disputes decision was totally alien to the history of Government-Contractor dealings under the disputes clause.

Further, if it ever were the case that the contracting agencies saw themselves as occupying a status sufficiently alien to their own decisions so as to warrant the desirability of obtaining judicial review, the problem could have been solved simply through change in contract language. No statute bound the agencies to adhere to the disputes clause and revision of that clause was at all times an administrative option.

The fact of the matter is that the contracting agencies, in particular the Department of Defense, were opposed to any impairment of the finality of their decisions beyond that which was necessary to secure the contractor's right of access to the courts. From the Defense Department's point of view, coextensive review was neither necessary nor desirable. Thus, in opposing the inclusion of the GAO in the proposed legislation, Roger Kent, General Counsel for the Department of Defense, had stated that:

> This would defeat the aims of both the Government and its contractors by making it impossible to accomplish the very purposes of the disputes clause; i.e., the achievement of proper and expeditious performance of contracts. (*House Hearings* at 132)

At the same time, however, the Department of Defense was distinctly aware that, having retained, by contract, the power to decide its own disputes, essential fairness required that contractors be guaranteed the right of access to the courts that they had enjoyed before the decision in *United States* v. *Wunderlich*, 342 U.S. 98 (1951). To achieve that end, Leonard Niederlehner, Deputy General Counsel for the Defense Department, testified before the Committee that his department had modified its disputes clause to limit finality by providing for review of the decision of the

head of the department by a court of competent jurisdiction under such criteria as fraud, arbitrariness, capriciousness or gross error implying bad faith. By these arrangements, he said, "we . . . have stipulated finality in our contracts to a degree which represents the interpretation of the courts as to finality before Wunderlich." "The arrangements which we have made are now adequate to protect the contractor." (*House Hearings* at 53) The Government's reference to this witness' statement about review in courts of competent jurisdiction (Govt. Br. 20, 21) should be read in the full context in which that statement was made. The Department of Defense never advocated the position of coextensive review which the Government now seeks to attribute to it.

The House Judiciary Committee Report that accompanied the final bill (H. R. Rep. No. 1380, 83d Cong., 2d Sess. (1954)), makes no mention of the novel construction of the Wunderlich Act that the Government now urges this Court to adopt. Certainly a right of the Government to obtain review of its own disputes decisions through a withholding of payment—representing as it does so drastic a departure from the practice and thinking that had obtained before the Wunderlich decision—would have demanded explicit comment by the House Committee. But such thoughts do not appear;[8] the single statement from that report which the

[8] It is significant to note that while the House Report borrowed from the language that had appeared in the earlier Senate report that accompanied S. 2487 (the amended version of that bill which specifically included the GAO) it did *not* repeat that language from the Senate report which acknowledged that a decision of a contracting officer might operate not only to the disadvantage of a contractor, but "also operate to the disadvantage of the Government in those cases, as sometimes happens, when the contracting officer makes a decision detrimental to the Government interest in the claim." (S. Rep. No. 1670, 82d Cong., 2d Sess. 2 (1952)

Government has chosen to include in its brief (Govt. Br. 22) most certainly does not bear out the Government's argument. That statement only reiterated thoughts that had been expressed several times during the hearings, namely, that, unless Government contracts were made mutually enforceable (meaning that the contractor should be provided with a forum in which his disputes would be given objective evaluation) the Government would become the loser in the long run. Further, the House report specifically points out that objection to the GAO had been predicated on Defense Department and industry fear that "inclusion of the Controller (sic) General in the wording of the bill would destroy the finality which existed under the Defense Department procedures." (H.R. Rep. No. 1380, 83d Cong., 2d Sess. at 2)

Not only does the committee report fail to support the Government's interpretation of the Wunderlich Act, but actual practice under that Act is contrary to the Government's point. Suits under that Act have been contractor suits seeking reversal of an adverse administrative decision, not suits, like this one, which was brought to enforce a payment that the contracting agency had earlier determined was due. The Government claims that this absence of agency-instituted Government "appeals" (i.e., forcing a contractor's suit by withholding payment) "cannot be attributed to a lack of knowledge on the part of the government that it too can obtain judicial review under the Act." (Govt. Br. 38) We think it can be attributed to nothing else but that. Why, for example, if the point is as certain and clear as the Government now claims it to be, should the GAO have sought to justify its unauthorized intervention in this case by claiming that:

> Where, as here, the disputes procedure has been exhausted in the contracting agency, there would

> be no further channel open to remedy an erroneous Disputes clause decision against the Government's interest unless our Office exercised its traditional jurisdiction to question such a decision. 46 Decs. Comp. Gen. 441, 458 (1966)

Why should the Department of Transportation have seen it necessary to propose a change in its procurement regulations specifically to permit review of its own disputes decisions (Pet. Br. 72, n. 16) if, as the Government now claims, the agencies always had that right under the Wunderlich Act? And why should this Court have described the standard disputes clause procedure in *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 399 (1966) as one involving Tucker Act suits brought into the Court of Claims by "the contractor".[4]

The answer to these questions is obvious: Congress never intended to vest the contracting agencies (or for that matter, any other governmental arm) with authority to withhold payment on a favorable contractor disputes decision in order to force judicial review by compelling the contractor to seek relief in court. The consensus of thought only confirms the point.

In summary, we submit that the Government's argument does not meet the issues in this case. It builds almost entirely upon that language in the legislative history that was specifically directed to the GAO and

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[4] The language referred to reads as follows:

> Appeals from the decision of the contracting officer are characteristically heard by a board or committee designated by the head of the contracting department or agency. Should the contractor be dissatisfied with the administrative decision and bring a Tucker Act suit . . . in the Court of Claims . . . the finality accorded administrative fact finding is limited by the provisions of the Wunderlich Act . . . . *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. at 399.

the protection to the Government that would be secured through that office, and, it asks this Court to assume that a congressional intent to provide for coextensive review remained even after the GAO was taken out of the legislation. The argument ignores the very reason for the opposition that was voiced against the GAO, it ignores the telling silence of the committee's report, and it ignores the fact that the only judicial decision that offers any comfort to the Government's argument is the Court of Claims' opinion in *C. J. Langenfelder & Son, Inc.* v. *United States,* 169 Ct. Cl. 465, 341 F. 2d 600 (1965), the dictum of which was later expanded into a holding for the decision below.[5] The problem of

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[5] The Government also cites the Court of Claims' decisions in *Northrop Aircraft, Inc.* v. *United States,* 130 Ct.Cl. 626, 127 F.Supp. 597 (1955) and *Acme Process Equipment Co.* v. *United States,* 171 Ct.Cl. 251, 347 F.2d 538 (1965) as support for its contention that payment upon final agency disputes determinations may be refused in order to force the matter into litigation. (Govt. Br. 25) The cases do not support the argument for which they are offered. The *Northrop* case did *not* involve a dispute arising under the contract nor a wrongful refusal on the part of the Government to pay over money that was due. At issue in that case was simply the Government's right to recover its proportionate share of the interest earned on a tax refund, the principal amount of which had earlier been permitted as an element of reimbursable cost under the plaintiff's CPFF contract. No contract provision was cited as bearing upon plaintiff's duty to refund. The duty to refund, said the court, "arises in equity and good conscience by natural implication from the principles of a CPFF contract." (130 Ct.Cl. at 629, 127 F.Supp. at 598) The *Acme* case involved a situation where a contractor brought a Wunderlich Act suit in the Court of Claims seeking to reverse a partially adverse Board determination while claiming, at the same time, that that aspect of his contract claim which had been favorably resolved by the Board was immune from re-examination by the court. We have never contended that the Wunderlich Act estops the Government from "opening up" a Board decision in a situation where the contractor is the one who freely brings suit because of alleged errors in a Board decision.

statutory interpretation raised in this case involves only one issue—the significance of taking the GAO out of the Wunderlich legislation. For the many reasons earlier stated, (Pet. Br. 37-49), it is Petitioner's position that the GAO's intervention in this case effected a breach of contract.

II. THE AEC DID NOT MAKE A DECISION NOT TO PAY PETITIONER'S CLAIMS. IT WAS FORCED INTO ITS POSITION BECAUSE OF THE UNAUTHORIZED INTERVENTION OF THE GAO AND THE POWER INHERING IN THAT OFFICE TO COMPEL ADHERENCE TO ITS OWN VIEWS ON THE MERITS OF A CLAIM BY DISALLOWING CREDIT IN THE ACCOUNT OF A CERTIFYING OFFICER.

The Government's second principal argument is that the actions taken by the GAO in this case are irrelevant because—according to the Government—"it was not the intervention of GAO that directly triggered petitioner's suit . . . . rather, it was the decision of the Commission not to pay petitioner's claims." (Govt. Br. 26)

It should be made clear to the Court that the issue of who precipitated Petitioner's suit is a consideration chiefly relevant to the Government's argument, not our own. It has never been our contention that the Wunderlich Act was meant to deny only to the GAO the right to compel judicial review of agency decisions favorable to a contractor. Rather, throughout these proceedings, it has always been Petitioner's position that under the Wunderlich Act no arm of the Government—whether that be the GAO or a contracting agency—should have a right to refuse payment upon a disputes decision in favor of a contractor.[6]

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[6] Our brief acknowledged the fact that even though the Wunderlich Act was intended for the benefit of contractors alone, a contracting agency could avail itself of the review standards of that

The Government attempts to have this Court avoid the question posed by the GAO's intervention for one reason only: That intervention exceeded not only the authority that the GAO was meant to exercise under the Wunderlich Act (see Pet. Br. 47, 48) but, at the same time, it exceeded the historically recognized limits of its inherent authority (Pet. Br. 38-41; *infra,* p. 22, Petitioner's Reply to the Views of the GAO). It is to escape this dilemma, and, at the same time to support the legitimacy of its own role in this case, that the Justice Department now makes the claim that Petitioner's suit was "directly triggered" by the contracting agency itself. The facts are otherwise.

Extensive administrative proceedings were held in connection with Petitioner's claims. These are fully stated in our brief (Pet. Br. 9, 10). We stress here that, at the conclusion of those proceedings, the head of the contracting agency (the Commissioners of the AEC) ordered the contracting officer:

> . . . to proceed to final settlement or decision [on the payment of Petitioner's claims] in accordance with the decision of the hearing examiner dated June 26, 1963, as modified by our order of November 14, 1963, and by this decision. 2 AEC Rep. 850, 856 (1964)

Act *if* it were to reserve such a right by appropriate contract language and, at the same time, undertake to make the correspondingly necessary changes in its applicable procurement regulations. (Pet. Br. 58, n. 10) This position in no way undercuts what we contend to have been the purpose underlying the Act because it was (and still is) open for the agencies to rewrite their disputes clauses so as to provide for complete and coextensive review. The Wunderlich Act does not change that option in the slightest.

The Commission's decision was never implemented and the reason, of course, was the fact that the GAO intervened, re-decided the case and reached a different conclusion. Before this Court, the Government's contention is that non-payment reflects a "decision of the Commission not to pay petitioner's claims" (Govt. Br. 26), whereas, before the Court of Claims, the Government made the point that "the Commission has not repudiated the decisions involved in this matter." (R. Defendant's Request For Review of the Commissioner's Recommended Opinion at 14, n. 4) However the Government may wish to characterize the Commission's actions, the truth of the matter is that those actions were taken not by choice, but by forced necessity —what the court below aptly described as "the Comptroller General's implied threat to charge the certifying officer's account. . . ." (App. 49)

It is this authority in the GAO—the power to charge a certifying officer's account, to disallow credit—that goes to the heart of the matter. Unless these consequences can be ignored or avoided by the paying agency, the GAO can use this authority to make its interpretation prevail and thereby extend its jurisdiction. As one eminent authority has put it, the Comptroller General "can *decide* what he cannot *prove*."[7] Thus, for the Government to now claim that the agency made a "decision" not to pay and to suggest, as the Government also does, that the "Commission could have ignored the GAO opinion and proceeded to final settlement. . . ." (Govt. Br. 26) is simply to ignore the

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[7] The reference is to Mansfield, *The Comptroller General*, 96 (1939).

reality of the situation.[8] It is an argument that elevates form over substance.

It was precisely in this light that Judge Skelton saw the situation. He said: "The AEC never at any time reversed, modified, canceled, set aside, or changed its final decision between the time it was issued on May 13, 1964, and the date this suit was filed on April 11, 1967, or thereafter." (App. 63) At the same time, Judge Skelton also saw the actions of the GAO in this case as going beyond the authority of that office. (App. 69) It was the combination of these two factors—the contracting agency's unabated adherence to its own final decision and the undermining of that decision by an exercise of unauthorized authority by the GAO—that led Judge Skelton to attack the Justice Department's assertion of the Wunderlich Act defense in this case. The Government's response to that attack (Govt. Br. 32-36) is a discussion that is irrelevant to the issues. Neither Judge Skelton—nor Petitioner in supporting his views—ever challenged the right of the Department of Justice to conduct litigation involving the United States *in a case otherwise properly before a court.* The whole point of Judge Skelton's position, and our own as well, is that the Justice Department

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[8] The Court need not speculate as to whether payment by the Commission would have resulted in disallowance. The Government's own brief tells us it would have. The "Views of the General Accounting Office", included in an appendix to the Government's Brief (at 41-50) state:

> . . . The GAO decision advising the Commission not to pay petitioner's claims was not, strictly speaking, the actual settlement of an account. The ruling consituted (sic) merely an advance notice to the Commission that credit would not be allowed in its disbursing officer's accounts if petitioner's claims were paid administratively in accordance with the Commission's disputes decision. . . . (Govt. Br. 44)

rationalized its role of defense attorney in this case by postulating a unique (and erroneous) construction of the Wunderlich Act and, within that framework (since it could not defend the GAO intervention) hypothesizing an agency rejection of a disputes decision that never happened. In short, a bootstrap approach.

III. BY AGREEING TO THE DISPUTES CLAUSE, THE CONTRACTOR GIVES UP HIS COMMON LAW RIGHTS TO STOP WORK AND SUE IN BREACH OF CONTRACT, IN EXCHANGE FOR OBTAINING A PROMPT DECISION BINDING ON THE AGENCY.

The Government contends that affirmation of the decision below will not impair the viability of the disputes clause. The argument which is now urged upon the Court in support of that decision offers convincing reasons to the contrary.

By the terms of the disputes clause, a contractor is obligated to proceed diligently with performance of the disputed work pending the resolution of a contract dispute—an obligation that carriers with it the substantial burden, for the contractor, of financing the work that is the subject of controversy. The *quid pro quo* for this relinquishment of the right to stop work and the burden of financing continued performance is the Government's promise to provide procedures that offer a fair, just and inexpensive means of promptly settling disputes arising under the contract. Within this framework, the long-accepted interpretation of the disputes clause has been that the quasi-judicial decisions rendered on contractor claims by a representative of the agency head were treated as final unless appealed to the courts by the contractor.[9]

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[9] Contrary to the Government's description, the "usual dispute proceeding" has never involved a before-payment review of board decisions in favor of a contractor by either an agency head acting

The Government now argues in favor of a system where finality for the contractor can never be secured except in the courts. Contract appeal board decisions, though held out as an agency's final decision by contract language and supporting regulations (Pet. Br. 68-71), are to be made subject to review and disavowal by an agency head, acting "either on his own or after consultation with GAO or the Department of Justice . . ." (Govt. Br. 27) and decisions of agency heads may be

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alone or in consultation with the GAO or the Department of Justice (Govt. Br. 27-28). Board decisions have always been regarded as *final* decisions. What, in fact, the Government is describing is the Attorney General's own conceptualization of the disputes process, as it was envisioned in 42 Ops. Att'y Gen. No. 33 (January 16, 1969). It was then that the idea of agency head review of board decisions was first articulated and the idea has no support in long-standing practices of the agencies in disputes proceedings.

Further, the Government makes a grave and serious error when it describes the contracting officer's role in the disputes process as one who "primarily represents the interests of the government" (Govt. Br. 29, n. 15) and whose decisions "are expected to represent the government's interests." (Govt. Br. 49) It is elementary that a contracting officer, in making a decision under the disputes clause, acts in a *quasi-judicial* capacity and must use his independent judgment "with due regard to the rights of both the contracting parties." *Ripley* v. *United States*, 223 U.S. 695 (1912); See also *Morgan* v. *United States*, 298 U.S. 468, 480, 481 (1936); *Penner Installation Corp.* v. *United States*, 116 Ct.Cl. 550, 563, 89 F.Supp. 545, 547 (1950); *Climatic Rainwear Co., Inc.* v. *United States*, 115 Ct.Cl. 520, 559, 88 F.Supp. 415, 421 (1950). This attempt to stigmatize a contracting officer's disputes determination with an inherently pro-Government bias is made in an effort to explain away the fact that the Wunderlich Act, by its terms, does not apply to decisions of contracting officers; hence it offers no basis upon which the Government could ever obtain judicial review of a contracting officer's decision favorable to a contractor. Thus, in terms of the argument which the Government now makes, it means that agency decisions rendered at a subordinate level are immune from attack while decisions of the agency head become subject to such an attack.

disavowed, either, because the GAO may "cast some doubt on the soundness of the agency's 'decision'" (Govt. Br. 28) or "merely . . . [because] the importance of the factual or legal issues raised warrant presentation to a court" (Govt. Br. 29). Few contractors could survive this maze of "second guessing". The Petitioner was among those who could not. The Government's argument is directly contrary to the provisions of the disputes clause and contrary to this Court's admonition that the disputes procedure is founded on the belief "that resort to administrative procedures is an expeditious way to settle disputes, conducive of speed and economy." (Footnote omitted) *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429 (1966).

There is a final point that requires comment. The Government's brief says that "Petitioner concedes that, under 41 U.S.C. 322 [the second section of the Wunderlich Act] no finality can attach to questions of law underlying agency disputes decisions." (Govt. Br. 40, n. 21) Our brief contains no such concession.

We defined finality against the Government in terms coextensive with the coverage of the standard disputes clause. Section 322, we said, was intended as a statutory restriction to bar the contracting agencies from extending their use of the disputes clause principle (and the historical concept of finality against the Government associated therewith) to matters other than disputed facts *and* the legal questions posed upon the resolution of such facts. (Pet. Br. 47, 48). We said:

> . . . where a legal question arises out of facts initially resolved under the disputes clause—the so-called mixed questions of fact and law that are posed by facts arising under the contract—this type of law question would fall beyond the reach of the GAO. (Footnote omitted) (Pet. Br. 48)

We think the point should have been obvious to the Government that, when we defined finality on questions of law underlying agency disputes decisions in terms of the GAO we were, at the same time, defining finality on such questions against the Government as a whole. It goes to the point repeatedly stated in this reply: throughout the legislative hearings the Government's interest in adverse disputes decisions was identified as operating through the GAO. When the GAO was taken out of the bill, it left the executive agencies free to decide their own contract disputes without the hindrance of second-guessing by the GAO and it left the contractors free to challenge adverse agency determinations in court.

IV. PETITIONER'S REPLY TO THE VIEWS OF THE GENERAL ACCOUNTING OFFICE AS STATED IN THE APPENDIX TO THE GOVERNMENT'S BRIEF.

In the committee report that accompanied the final bill that became the Wunderlich Act, it is concluded that the effect of the Act would be to leave the "GAO in precisely the same position it was in before the decision in the Wunderlich and Moorman cases." H. R. Rep. No. 1380, 83d Cong., 2d Sess. 6 (1954). It would thus seem to us that any analysis attempting to justify the lawfulness of the GAO's actions in this case would have, as its premise, a full explanation of the position held by the GAO with respect to agency contract disputes and payments prior to the *Wunderlich* and *Moorman* decisions. But neither the Government's brief nor the GAO's own views (Govt. Br. 41-50) provide this Court with such an explanation. In fact, those views offer an analysis that ends where it should begin and throughout they assume the existence of an authority in the GAO which is never proven.

Not only has the GAO not met the critical point in issue, but, we submit, it cannot meet that point. The truth of the matter is that prior to the *Wunderlich* and *Moorman* decisions, the GAO never had authority to assert control over contract matters of the sort that was exercised against Petitioner and the contracting agency in this case. Repeatedly, the Comptroller had been told through court decisions and administrative opinions that his functions as an accounting officer did not vest his office with authority to second-guess decisions of other executive officers in connection with matters specially entrusted to their judgment. See, *Miguel* v. *McCarl,* 291 U.S. 442 (1934); *United States* v. *Mason & Hanger Co.,* 260 U.S. 323 (1922); *Wright* v. *Ynchausti & Co.,* 272 U.S. 640 (1922); *United States* v. *Jones,* 59 U.S. (18 How.) 92 (1856); *McShain Co., Inc.* v. *United States,* 83 Ct. Cl. 405 (1936); *Albina Marine Iron Works, Inc.* v. *United States,* 79 Ct. Cl. 714 (1934); 37 Ops. Att'y Gen. 534, (1934); 37 Ops. Att'y Gen. 437 (1934); 37 Ops. Att'y Gen. 95 (1933); 36 Ops. Att'y Gen. 289 (1930); 34 Ops. Att'y Gen. 311 (1924); 34 Ops. Att'y Gen. 162 (1924). Nothing in the Wunderlich Act has altered this limitation on the GAO's authority, and, not until this case, has the GAO ever seriously contended to the contrary.

The only other point that requires comment is the GAO's attempt to draw a distinction between the absolute finality accorded a contracting officer's decision —as was the case, for example, in *United States* v. *Mason & Hanger Co., supra*—and decisions rendered by contract appeal boards. According to the GAO, the difference between these respective decisions is that "contracting officers . . . are expected to represent the government's interests" whereas "Boards function as independent tribunals. . . ." (Govt. Br. 49). The dis-

tinction is non-existent. Contract boards, like contracting officers, are representative agents who derive their authority from, and are beholden to, the same source: the head of the agency. As stated herein, both have the duty to use objective, independent judgment. (*supra*, at 18, 19, n. 19) But even if one were to speak with less partiality than the other in deciding a contractor's claim, that would have absolutely no bearing on the finality that attaches to the decision insofar as the GAO is concerned. Absent fraud or overreaching, the GAO is without authority to question either decision because the matter in dispute is within the exclusive province of *the agency* to decide. And this is so because it is the agency alone that has been delegated the authority to enter into contracts, hence it alone has the right to decide how, and in what manner, it shall resolve disputes arising under its contracts.

CONCLUSION

In considering this case, we ask that the Court give thought to the calamity that befell S&E Contractors. Operating within the framework of the contract forms, regulations and procedures mandated by the Government, S&E Contractors undertook a construction project in 1961 during the course of which it was compelled to furnish extra labor, materials and effort equal to twice the original contract price. It sought recompense for those outlays in accordance with the Government's own rules and it prevailed, but it has yet to receive one penny on its claims, and is out of business due to this extraordinary assertion of power by the General Accounting Office—a power which the Department of Justice now claims to be irrelevant to the issues in this case.

Neither the history of the Wunderlich Act nor considerations of public policy could support either the unauthorized actions taken by the GAO in this case or the arguments advanced by the Department of Justice. The Government is fully protected by the technical, management and legal skills within the using agency and by the adversary proceeding which it conducts and in which it participates. There is, therefore, neither reason nor need to vest the GAO with power to review agency disputes' decisions, absent fraud or overreaching.

We urge the Court to reestablish what has heretofore been an orderly process for the resolution of contractual disputes between the Government and its contractors. The Court is asked to reverse the judgment of the Court of Claims and direct that Petitioner's Motion for Summary Judgment be granted.

Respectfully submitted,

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